No. 15-474

Supreme Court, U.S.
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In The
Supreme Court of the United States

ROBERT F. McDONNELL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF OF *AMICUS CURIAE* CAMPAIGN LEGAL CENTER IN SUPPORT OF RESPONDENT

J. GERALD HEBERT
Counsel of Record
TARA MALLOY
PAUL S. RYAN
MEGAN P. MCALLEN
BRENDAN M. FISCHER
THE CAMPAIGN LEGAL CENTER
1411 K Street, Suite 1400, NW
Washington, DC 20005
(202) 736-2200
ghebert@campaignlegalcenter.org

Counsel for Amicus Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICUS CURIAE*[1]

This brief is filed by the Campaign Legal Center, a non-profit, non-partisan organization that works to enact, implement and defend effective campaign finance and ethics laws. It was created to represent the public perspective in administrative and legal proceedings in the areas of campaign finance, voting rights and government ethics and to protect the integrity of government and the ability of all Americans to participate in the political process.

SUMMARY OF ARGUMENT

At the 1787 Constitutional Convention, George Mason warned that "if we do not provide against corruption, our government will soon be at an end." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 392 (Max Farrand ed. 1966). Today, almost 250 years later, former Virginia Governor Robert F McDonnell makes the extraordinary request that this Court find *protections* for corruption in the Constitution and recognize a new "fundamental constitutional right" to buy preferential access to public officeholders. Pet. 14. He invokes this new right solely for the purpose of

[1] This brief was not authored in whole or in part by counsel for any party. No person or entity other than the Campaign Legal Center or its counsel made a monetary contribution to this brief's preparation or submission. Both petitioner and respondent have filed with the Court blanket written consents to the filing of *amicus curiae* briefs.

getting out of a conviction for soliciting and accepting more than $175,000 in bribes – including free trips, a custom golf bag and a Rolex watch.

Petitioner was convicted of Hobbs Act extortion, 18 U.S.C. § 1951(b)(2), and honest-services fraud, 18 U.S.C. §§ 1341, 1343, 1346, in a proceeding wherein the "official action" component of the corruption charges was defined by the federal bribery statute, 18 U.S.C. § 201. His defense, both at the trial court level and before this Court, centers on the argument that his actions on behalf of Jonnie R. Williams, Sr., the CEO of Star Scientific, amounted to no more than the "provision of mere 'access'" or the "conferral of amorphous reputational benefits" (Br. 14), and consequently did not rise to the level of "official actions" as defined by the bribery statute.

Petitioner puts forth various theories for why his actions do not constitute "official acts" – none of which have merit – but *amicus* will focus on his most radical claim, that the First Amendment shields him from prosecution because his actions taken on behalf of Williams were "constitutionally protected and an intrinsic part of our political system." Pet. 14. In making this argument, petitioner relies primarily upon two recent decisions of this Court reviewing campaign finance laws, *Citizens United v. FEC*, 558 U.S. 310 (2010), and *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014).

But neither case purported to invent a new free-standing constitutional right to purchase access to

officeholders. The Supreme Court in those decisions merely found that two specific laws – the federal corporate expenditure restriction, 2 U.S.C. § 441b (recodified at 52 U.S.C. § 30118), and the federal aggregate contribution limit, 2 U.S.C. § 441a(a)(3) (recodified at 52 U.S.C. § 30116(a)(3)) – could not be sustained under the First Amendment on the records compiled by the government in support of the laws since they contained no evidence of quid pro quo arrangements and only "scant evidence" of ingratiation and access resulting from the regulated campaign activities.

Indeed, far from establishing the purchase of access as a "constitutionally protected" right, both cases expressly acknowledged that *McConnell v. FEC*, 540 U.S. 93, 161-73 (2003), found that the government's interest in preventing this form of corruption justified the federal soft money contribution limits in the Bipartisan Campaign Finance Act (BCRA). *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1451 n.6 ("Our holding clearly does not overrule *McConnell*'s holding about soft money."). *Citizens United* and *McCutcheon* should thus be understood in the context of the Court's broader campaign finance jurisprudence, which addresses not only the "danger of actual quid pro quo arrangements" but also "the appearance of corruption stemming from the opportunities for abuse inherent in a regime of large individual financial contributions." *Buckley v. Valeo*, 424 U.S. 1, 27 (1976). Accepting petitioner's argument would not only lead to an absurd result in this case – effectively sanctioning an open and undisputed quid pro quo

exchange of $175,000 for political favors and "courtesies" – but it would also do enormous damage to this Court's longstanding campaign finance precedents, which have already undergone significant disruptions in the past decade.

Although the very premise of petitioner's First Amendment argument is faulty – this Court has never recognized a "right to purchase access" – his constitutional arguments fail for at least two additional reasons. First, the conduct that forms the basis of petitioner's conviction cannot be characterized as "mere access," and certainly does not resemble "access" as discussed in this Court's campaign finance case law. Petitioner did not simply make himself available to Williams; he facilitated access to other governmental officials and exerted his considerable influence over those officials in an effort to secure the governmental actions requested by Williams. Second, and more fundamentally, petitioner overlooks a crucial distinction between his conduct and the campaign finance cases he cites: here, the "forbidden quid" (Br. 25) was not campaign support, which enjoys significant protections under the First Amendment, but instead, gifts and personal loans, which do not.

Finally, petitioner's demand for a narrow construction of the "official action" component finds no support in the governing statutes or case law. He complains that "official acts" can include only those actions that represent "a thumb on the scales of any government decision" (Br. 53), but this principle was

in fact reflected in the jury instructions, and there was ample evidence to support the jury's finding that petitioner took official action as described in those instructions. His contention that "prefatory" acts cannot be "official" acts (Br. 33, 54) runs counter to all of the governing case law. And in claiming that the trial court's construction of the laws under which he was convicted will "criminalize politics" (Br. 40-42), petitioner ignores that these laws already contain a significant narrowing requirement: proof of a corrupt quid pro quo. As this Court has recognized, quid pro quo bribery schemes are – and have long been – "plain as a pikestaff" corruption, *Skilling v. United States*, 561 U.S. 358, 412 (2010) (quoting *Williams v. United States*, 341 U.S. 97, 101 (1951)). The need to prove intent ensures that "official acts" will not sweep so broadly as to encompass "innocuous" political activities.

For all these reasons, the judgment of the court of appeals should be affirmed.

ARGUMENT

I. "Paying for Access" Is Not a "Fundamental Constitutional Right."

Petitioner seeks to create a new constitutional right to "buy access" because he can offer no other

basis for the novel construction of the bribery statute he seeks: an exception[2] for those "official acts" that he characterizes, without any judicial test or discernable standards, as "mere access" or "routine courtesies." Br. 18, 22, 24-26. But this Court has never held, either in its campaign finance case law or its public corruption precedents, that there exists a free-standing constitutional right to political "access and influence," much less that "*paying* for such 'access' is constitutionally protected." Pet. 14 (emphasis added). *See also* Part I.C, *infra*.

A. Petitioner Defines "Access" So Expansively as to Render the Term Meaningless.

Petitioner asks this Court not only to recognize new constitutional protections for an officeholder's "provision of access" to benefactors and donors, but also to conceive of such "access" broadly, as encompassing every step an official takes towards achieving a supporter's desired end short of a "final" governmental decision. Pet. 14-15, 24-25; *see also* Br. 24-25,

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[2] At trial, petitioner sought jury instructions that would narrow the scope of "official action" with a declaration that *Citizens United* exempted "ingratiation and access" from this component of the charges. Pet.App.146a. Such an instruction, according to petitioner, should categorically exempt actions such as "arranging a meeting, attending an event, hosting a reception, or making a speech," because to do otherwise would "conjure[ ] a federal felony out of what this Court has held to be a fundamental constitutional right." Pet. 14.

30-31. Even if petitioner were correct that the campaign finance cases actually created a "right" to purchase access, *see* Part I.C, *infra*, his expansive notion of what constitutes "access" stretches that concept to its breaking point.

According to petitioner, "this Court [has] held that actions like a visit, speech, or meeting are not, standing alone, 'official acts,'" but instead "constitutionally protected" access. Pet. 14. However, McDonnell was not convicted for "visits, speeches, and meetings" with Williams or his company Star Scientific, but rather for acts including: promoting testing of Star's product, Anatabloc, with Virginia's Secretary of Health and Human Resources; directing the Secretary to meet with Williams "on the Star Scientific [A]natabloc[ ] trials" at the University of Virginia (UVA) and Virginia Commonwealth University (VCU); organizing an event at the governor's mansion with officials from UVA and VCU to "encourag[e] [the] universities to do research on [Anatabloc]"; and urging the Virginia Secretary of Administration, who oversaw state employee health plans, to meet with Star representatives to discuss covering Anatabloc under the state plan. *See* Pet.App.71a-76a.

None of petitioner's actions resemble the Court's conception of "access" in its campaign finance decisions, which clearly is limited to a campaign supporter's access to the officeholders she supported. *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1441 (citing *Citizens United*, 558 U.S. at 359) (noting that regulation should not "target the general gratitude a candidate

may feel toward those who support him or his allies, or the political access such support may afford"); *see also id.* at 1450-51. Petitioner, by contrast, provided Williams with access to *other* governmental officials and employees. And all of petitioner's actions here involved wielding his official authority to influence those state actors to work toward specific outcomes – namely, those requested by Williams. Broadening "access" to cover such acts renders the term meaningless, and does not comport with its usage in the campaign finance case law.

Reflecting the novelty of his conception of "access," petitioner coins a new phrase – "procedural access" – which apparently encompasses every "step toward a governmental decision" short of a final governmental action. Pet. 24-25. Indeed, the term appears to relate less to "access" as conceived in *Citizens United* and *McCutcheon*, and more to petitioner's later claim that "prefatory steps that could inform an eventual decision or action" cannot, as a matter of law, constitute "official action." Br. 33. In petitioner's view, "procedural access" extends beyond an official making himself "accessible" to campaign supporters, and instead includes his use of official authority on a benefactor's behalf to "access" and influence other government officials – but, citing *Citizens United*, he nonetheless declares that such activities are "precisely the sort of '[i]ngratiation and access' this Court has consistently explained 'are not corruption.'" Pet. 25. Petitioner clearly misreads the

case law. Unsurprisingly, he can offer no specific language or finding from the campaign finance cases that would support this all-encompassing version of access – because there is none.

B. The Public Corruption Case Law Does Not Require a Narrow Construction of "Official Actions" to Exclude the Provision of "Procedural Access."

The public corruption cases petitioner cites as establishing the concept of "procedural access" (*see* Pet. 24), do not support his open-ended concept of "access," nor do they require extending constitutional protection to the provision of access, however that term is defined.

According to petitioner, *United States v. Urciuoli*, 513 F.3d 290 (1st Cir. 2008), stands for the proposition that "granting mere 'access and attention'" does not implicate official power, and that "trading on 'access' [is] not criminal." Pet. 21, 24. But in *Urciuoli*, the First Circuit made only passing reference to a state legislator's use of his title and official letterhead to gain the "access and attention" of local officials, who he urged "to obey state law" in a manner that would benefit hospitals that had paid him a gratuity. 513 F.3d at 295-96. *Urciuoli* did not hold that the hospitals had a constitutional right to buy access to the legislator or to pay him to influence others through "procedural access." Instead, the First Circuit held that the legislator did not violate the honest

services statute because he had no direct authority over the local officials he contacted, and because the laws he encouraged the officials to obey did not implicate any "matter before him." *Id.* at 295.[3] Indeed, the court of appeals noted that under the relevant state law, the legislator could have been legally paid for this advocacy. *Id.*

Nor does the Eighth Circuit's decision in *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979), support petitioner's unbounded concept of a constitutional right of "access." Petitioner claims that *Rabbitt* protects officials who "afford[ ] access without trying to control the ultimate outcome." Pet. 18; *see also* Pet. Br. 29-30. *Rabbitt*, however, involved a state legislator who introduced an architectural company to government officials who had authority over state construction contracts, but over whom the legislator had no authority. 583 F.2d at 1028. It certainly did not endorse a constitutional right to buy "access" to these public officials; instead, the court held that the legislator had not violated the Hobbs Act because he never agreed to use his official position to influence the government officials, and the architects did not possess a reasonable belief in the legislator's apparent power to exert any such influence. *Id.*

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[3] Here, the matters in question were within petitioner's authority and the officials he sought to influence were his subordinates. Pet.App.70a-71a.

Petitioner's reliance on the D.C. Circuit's decision in *Valdes v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (en banc), is likewise misplaced. Br. 16. There, the en banc court of appeals reversed a conviction under the federal gratuities statute of a police officer who had accepted payment in exchange for retrieving information from a police database. The court reversed not because the officer afforded only "procedural access" to the gratuity-payor, but because the payor was seeking something (the database search) that did not implicate any "question, matter, cause, suit, proceeding or controversy" whose answer or disposition is determined by the government. *Id.* at 1323-24 (citation omitted). The officer's actions – albeit a misuse of government resources – thus did not amount to an "official act" under 18 U.S.C. § 201(a)(3). *Id.* at 1330.

Similarly, the hypothetical scenarios discussed in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 406-07 (1999), which petitioner leans upon heavily (*e.g.*, Br. 37-39), are distinguishable because the gratuity – payors did not want or expect anything that could be described as "official action" in exchange for their gifts. *Id.* at 407 The apparent "quo" in those scenarios – a sports team's visit to the White House, the Secretary of Education's visit to a school, the Secretary of Agriculture's speech to farmers, *id.* at 406-07 – did not implicate any "question, matter, cause, suit, proceeding or controversy" whose answer or disposition is determined by the government. *Id.*

Here, by contrast, the Fourth Circuit found that Williams' ultimate goals did involve official acts, namely: whether state universities would perform studies, whether a state commission would provide funding, and whether the state health plan would cover Anatabloc. Pet.App.69a-70a. And despite petitioner's efforts to disentangle his benefactor's ultimate goals from the individual steps he took to achieve them, the jury found that his actions furthered Williams' overarching goals and hence constituted "official acts."

There is simply no basis for petitioner's attempt to excise acts of "procedural access" from the federal bribery statute or the Hobbs Act on First Amendment grounds, and the case law he cites for this proposition – *Urciuoli*, *Rabbitt*, *Valdes* and *Sun-Diamond* – does not counsel otherwise. Indeed, if his theory were correct, the court of appeals would have needed to reverse the bribery conviction of former Representative William J. Jefferson (D-LA) for providing the same kind of "procedural access." *United States v. Jefferson*, 674 F.3d 332 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 648 (2012). Jefferson was convicted of bribery and honest-services fraud, based in part on allegations that he promoted a company's technology in Africa in exchange for a series of bribes, including payments to his family's consulting firm. *Id.* at 337-38. Yet the acts he performed in exchange for bribe payments are functionally indistinguishable from the "visits, speeches, and meetings" that petitioner treats as synonymous with the protected forms of "access" in

this Court's campaign finance cases. *See* Pet. 14. The Fourth Circuit upheld Jefferson's conviction based on "official acts" that included: "corresponding and visiting with foreign officials"; "[a]ttempting to facilitate and promote" certain business ventures; "[s]cheduling and conducting meetings"; and "seeking to secure construction contracts." 674 F.3d at 356; *see also* Pet.App.58a-59a. Jefferson likewise argued that the instructions allowed the jury to convict based on a legally insufficient definition of "official action." *Id.* at 338-39. But the Fourth Circuit found no deficiency with the trial court's "official act" instructions and affirmed his conviction and 13-year sentence, *id.* at 369, and this Court declined to grant certiorari. 133 S. Ct. 648 (2012).

C. *Citizens United* and *McCutcheon* Do Not Create a Right to Purchase Access to Officeholders.

Petitioner's claim that the First Amendment requires exempting acts of "procedural access" from "official actions" finds no support in the public corruption case law. But his argument has a more fundamental defect. Its very premise – that purchasing political access is "constitutionally protected" under this Court's campaign finance decisions (Pet. 14) – is utterly wrong. *Citizens United* and *McCutcheon* did not purport to invent a new free-standing constitutional right to buy access to officeholders. Petitioner's claims to the contrary make a mockery of this Court's longstanding approval of measures that protect the

integrity of government. *See, e.g.*, *Buckley*, 424 U.S. at 26-28; *United States v. Birdsall*, 233 U.S. 223 (1914).

Indeed, this Court's precedents still recognize that the governmental interest in preventing large donations from "buy[ing] donors preferential access" will justify certain campaign finance regulations. *McConnell*, 540 U.S. at 156 (upholding limits on soft money contributions to parties). *Citizens United* and *McCutcheon* did not alter this perspective. In those decisions, this Court merely found that two specific laws, the federal corporate expenditure restriction and the federal aggregate contribution limit, could not be sustained based on the minimal records compiled by the government in both cases – records that contained no evidence of quid pro quo arrangements and only "scant evidence" of ingratiation and access resulting from the regulated campaign activities. *See Citizens United*, 558 U.S. at 360; *McCutcheon*, 134 S. Ct. at 1447 n.4.

As a threshold matter, this case concerns relationships based on *gifts*, which do not implicate the First Amendment, so *Citizens United* and *McCutcheon* simply do not apply. Insofar as petitioner argues that these campaign finance decisions establish a right to buy access to officeholders through gifts or loans, he is clearly incorrect. *See* Part II, *infra*.

But he is also incorrect to claim that either precedent created any "right" to purchase preferential access to officeholders through campaign contributions

and expenditures. Instead, those decisions were based on concerns about the rights of free expression and association – which the Court sought to shield from what it saw as intrusive state restrictions enacted without the justification of a legislative record demonstrating quid pro quo corruption. In other words, the decisions "should be understood as saying not that the [First] Amendment protects influence and access, but that it protects the campaign-related activities, for example, independent expenditures[,] that yield influence and access." George D. Brown, *Applying Citizens United to Ordinary Corruption: with a Note on Blagojevich, McDonnell, and the Criminalization of Politics*, 91 NOTRE DAME L. REV. 177, 186 (2015).

Citizens United struck down, under strict scrutiny, the federal ban on using corporate treasury funds for independent expenditures expressly advocating a candidate's election or defeat. The Court reasoned that because independent expenditures made by *individuals* were found unlikely to corrupt in *Buckley*, the same should be true for those made by corporations. 558 U.S. at 364 ("The First Amendment does not permit distinctions based on the corporate identity of the speaker."). The Court rejected the government's proffered anti-corruption rationale for the law, finding that the record contained no evidence that independent corporate spending gave rise to quid pro quos, and the government's concerns that such spending correlated with access to officeholders did not justify the heavy burden of a restriction on

expenditures. 558 U.S. at 360 (noting that record "does not have any direct examples of votes being exchanged for expenditures" and contained "only scant evidence that independent expenditures even ingratiate").

The decision made clear, however, that this analysis was specific to *independent* expenditures. By contrast, the Court acknowledged that the government's interest in preventing the purchase of access could still support limits on direct contributions to candidates and officeholders. *Id.* at 360-61. Indeed, it noted that the "BCRA record establishes that certain donations to political parties, called 'soft money,' were made to gain access to elected officials," *id.*, and recognized that it should defer to any such congressional findings of corruption. *Id.* at 361. But "this case," the Court cautioned, "is about independent expenditures, not soft money." *Id.* That independence, the Court noted, "not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate" – a distinction not relevant in this case, where the gifts in question were provided directly to the public official. *Id.* at 357 (citing *Buckley*, 424 U.S. at 47).

Moreover, *Citizens United* did not purport to bless the actual *sale* of access; instead, it found that the mere "fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt." *Id.* at 359. The Court was concerned about an attempt to paint the natural political

allegiance between candidates and their supporters as necessarily corrupt, remarking that "[f]avoritism and influence are not avoidable in representative politics." *Id.* (citing *McConnell*, 540 U.S. at 297 (opinion of Kennedy, J.) ("Access in itself, however, shows only that in a general sense an officeholder favors someone or that someone has influence on the officeholder. There is no basis, in law or in fact, to say favoritism or influence in general is the same as corrupt favoritism or influence in particular."). Thus, *Citizens United* did not hold, as petitioner contends, that a law cannot target an actual quid pro quo exchange of contributions for political access. Indeed, the Court acknowledged the legitimacy of BCRA's soft money restrictions, which were intended to prevent exactly those exchanges. *Id.* at 360-61. In any event, the Court did not even come close to announcing the novel principle that petitioner asserts here – that the right to purchase access to public officials is enshrined in the Constitution.

In *McCutcheon*, this Court repeated the language from *Citizens United* that "ingratiation and access are not corruption," 134 S. Ct. 1441, but in no way suggested it was elevating the "purchase of access" to a constitutional right. *McCutcheon* involved a challenge to the federal aggregate contribution limit, which *Buckley* had upheld as a measure to thwart circumvention of the base contribution limits. 424 U.S. at 38 (approving aggregate limits because they "prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive

amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate's political party"). The four-Justice plurality in *McCutcheon* declined to accept this theory of circumvention, holding that the government's hypothetical schemes of potential circumvention involving joint fundraising were "implausible" and "divorced from reality." 134 S. Ct. at 1452-53, 1456.

In addition to its circumvention rationale, the government advanced a theory that large aggregate campaign giving could give rise to the reality and appearance of corruption, even where the contributor complied with the base contribution limits as to each individual candidate and party committee. Br. of Appellee at 40, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (No. 12-536). However, there was no record presented of large aggregate contributions giving rise to corruption – whether in the form of quid pro quos or in the form of undue access and influence – in part because the law under challenge had been on the books for almost 40 years.[4] As a result, the plurality came to the unsurprising conclusion that the government had not shown that quid pro quo corruption or

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[4] Elsewhere, the Court has recognized the inherent "difficulty of mustering evidence to support long-enforced statutes." *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 457 (2001) (citing *Burson v. Freeman*, 504 U.S. 191, 208 (1992)).

its appearance would result from "donors furnish[ing] widely distributed support within all applicable base limits." 134 S. Ct. at 1461. Thus, the plurality's discussion of whether corruption encompassed "ingratiation and access" or only quid pro quo arrangements was dicta. There was no record in *McCutcheon* of large aggregate giving within the base limits generating corruption in *any* form. At the same time, a majority of the Court agreed that the base limits on contributions to candidates directly addressed the possibility of actual and apparent quid pro quo corruption. 134 S. Ct. at 1442.

Moreover, far from establishing the "purchase of access" as a "constitutionally-protected" right, this Court has affirmed that in many contexts, buying "access" is a form of corruption that will indeed support campaign finance restrictions. Preceding *Citizens United* and *McCutcheon* was this Court's 2003 decision in *McConnell*, which upheld BCRA's "soft money" limits on contributions to political parties based in large part on the concern that "party committees [were] *peddling access* to federal candidates and officeholders in exchange for large soft-money donations." 540 U.S. at 150 (emphasis added).

Both *Citizens United* and *McCutcheon* expressly acknowledged that *McConnell*'s holding sustaining the soft money contribution limits remained good law. *Citizens United*, 558 U.S. at 360-61; *McCutcheon*, 134 S. Ct. at 1451 n.6 ("Our holding clearly does not overrule *McConnell*'s holding about soft money."). The

discussion of corruption in the two later cases must thus be read in a manner consistent with *McConnell*'s affirmance of the legitimacy of the government's concern about the sale of access. The key to reconciling these cases is the principle set forth in *McConnell* that while "mere political favoritism or opportunity for influence alone is insufficient to justify regulation," "it is the manner in which parties have *sold access* to federal candidates and officeholders that has given rise to the appearance of undue influence." 540 U.S. at 153-54 (emphasis added). Thus, the general affinity an officeholder may have with contributors and political supporters – and the access that may result – is not necessarily problematic, but where there is evidence of a particular exchange of money for access, then concerns about corruption arise.

This principle also informed *Republican National Committee (RNC) v. FEC*, 561 U.S. 1040 (2010), *aff'g* 698 F. Supp. 2d 150 (D.D.C. 2010) (three-judge court), wherein this Court reaffirmed *McConnell* in an as-applied challenge to the soft-money restrictions. *RNC* specifically considered the impact of *Citizens United*, but ultimately found that "*Citizens United* did not disturb *McConnell*'s holding with respect to the constitutionality of BCRA's limits on contributions to political parties." 698 F. Supp. 2d at 153. In particular, the three-judge court found – and this Court summarily affirmed – that although *Citizens United* questioned whether campaign activities can be limited for generally "creat[ing] gratitude" or "facilitat[ing] access," the Court did not rule out enacting

measures, such as the party soft money limits, to target more precisely "*the selling of preferential access* to federal officeholders and candidates." *Id.* at 158 (emphasis added).

Finally, even if *Citizens United* and *McCutcheon* are understood to have circumscribed the scope of corruption that can be justifiably targeted through campaign finance regulation, neither decision narrowed corruption in a manner helpful to petitioner's defense. In both cases, the Court was most concerned about the government's failure to put forward any evidence of actual *quid pro quo corruption* or the appearance of such corruption in connection to either independent corporate spending or large aggregate giving. So even insofar as *Citizens United* and *McCutcheon* heralded a change in this Court's view of regulable corruption in the campaign finance context, they did so by limiting regulation to only those campaign activities that have been shown to give rise to actual quid pro quo exchanges.

Here, however, a quid pro quo is already a required element of the bribery law, and petitioner does not contest that the jury found such a "corrupt agreement" in his case. And neither *Citizens United* nor *McCutcheon* held that corruption should be narrowed by limiting the *range of acts* that counted as the "quo" in such quid pro quo arrangements; on the contrary, the *RNC* decision makes clear that the "*selling of preferential access*" can constitute such a "quo." 698 F. Supp. 2d at 158 (emphasis in original). Of course, this Court found that in the absence of a record

demonstrating quid pro quos, the general "fact that speakers may have influence over or access to elected officials" was not sufficient to sustain the campaign finance laws under challenge. But where a conviction requires corrupt intent – as is the case here – any concerns voiced in *Citizens United* and *McCutcheon* about an expansive conception of corruption are simply not present.

II. This Court's Campaign Finance Precedents Do Not Apply to a Prosecution Lacking Any Nexus to a Campaign.

Although petitioner devotes much of his submissions to the argument that *Citizens United* and *McCutcheon* determine the outcome here, he ignores an obvious and glaring reason why both decisions are inapplicable: this case involves no campaign contributions or expenditures. He claims nevertheless that "the First Amendment principles [*Citizens United*] invoked are no less applicable to penal statutes" (Pet. 14-15), based on the rationale that "[c]ampaign contributions can serve as forbidden quid, just like personal gifts." Br. 25.

That statement wholly misses the point: in his case, the "forbidden quid" was not a campaign contribution. Instead, it comprised gifts and personal loans, and none of those "quids" implicate the First Amendment. To be sure, a campaign contribution can constitute the "[ ]thing of value" that forms the basis of a

conviction under the federal bribery law or Hobbs Act. *See, e.g.*, *McCormick v. United States*, 500 U.S. 257, 271-73 (1991); *United States v. Siegelman*, 640 F.3d 1159 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 2711 and 132 S. Ct. 2712 (2012). But it does not follow that this Court's campaign finance jurisprudence governs the review of convictions under the public corruption laws, which are based upon the acceptance of *gifts*, not campaign support. And it certainly does not follow that the types of corruption that can be legitimately targeted with a prophylactic campaign finance law mark the outer boundary of activities that can constitute "official action" for a bribery charge. Petitioner's argument to the contrary is more an exercise in wishful thinking than legal reasoning.

The campaign finance context is distinct. In reviewing a campaign finance regulation, this Court applies heightened scrutiny to weigh First Amendment concerns against the government's interest in the challenged regulation of money in politics. In the bribery context, however, at least where the quid is a gift or direct payment to an official, there is no comparable First Amendment counterweight.

Since *Buckley*, this Court has recognized that both making a campaign-related expenditure and contributing to a campaign represent acts of expression and association. According to the Court, a campaign expenditure is central to political speech because "virtually every means of communicating ideas in today's mass society requires the expenditure of money,"

even the "distribution of the humblest handbill or leaflet." 424 U.S. at 19. A contribution also implicates the First Amendment, but to a lesser degree, because while "[a] contribution serves as a general expression of support for the candidate and his views," it does not "communicate the underlying basis for the support," and "the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* at 21. Even though campaign contributions are thus accorded less constitutional protection, the Court has noted that campaign contributions also serve the "important role" of "financing political campaigns," and are necessary in our largely privately-financed electoral system if "candidates and political committees [are to] amass[ ] the resources necessary for effective advocacy." *Id.*

By contrast, a gift raises none of these First Amendment implications. A personal gift or loan directly supports a person or subsidizes a lifestyle, with little or no expressive content. An individual therefore has no "right" under the First Amendment or any other constitutional provision to make a gift to a public officeholder, and legislatures can – and often do – restrict gifts of more than de minimis value to public officials and employees. *See, e.g.*, 5 U.S.C. § 7353; 5 C.F.R. §§ 2635.201-.205. Nor is there any compulsion for an officeholder to accept a gift, which stands in contrast to a candidate's need to fundraise in the vast majority of electoral races at the federal

and state level that must be privately financed. These distinctions were explicitly recognized in *United States v. Ring*, 706 F.3d 460 (D.C. Cir. 2013):

> [W]hereas soliciting campaign contributions may be practically 'unavoidable so long as election campaigns are financed by private expenditures,' accepting free dinners is certainly not. Moreover, the First Amendment interest in giving hockey tickets to public officials is, at least compared to the interest in contributing to political campaigns, de minimis. Accordingly, to the extent concerns about criminalizing politically necessary activity or chilling constitutionally protected conduct justify imposing a higher bar for criminalizing campaign contributions, such concerns carry significantly less weight with respect to other things of value.

Id. at 466 (internal citations omitted).

Furthermore, a campaign contributor may donate to a candidate because he wishes to advance the candidate's policy goals or ideological worldview. Given that candidates will often share the ideological views of their supporters, this Court has been reluctant to ascribe corrupt intent to all campaign contributors or to assume, without a record to the contrary, that an officeholder's responsiveness to his political supporters is necessarily the result of a quid pro quo arrangement. As this Court has explained: "It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies."

Citizens United, 558 U.S. at 359 (citing *McConnell*, 540 U.S. at 297 (opinion of Kennedy, J.)). An officeholder's responsiveness to a campaign contributor may well reflect shared political preferences and common goals, and consequently, without more, may not be sufficient grounds for a prophylactic campaign finance prohibition. *McCutcheon*, 134 S. Ct. at 1441.

The same concerns are not present in the context of laws that proscribe or regulate *gifts*, such as the operative public corruption laws here. While a donor may choose to give gifts to the officeholders whose policies she admires, the gift itself in no way advances such policies. Unlike a campaign contribution, a gift does not finance the drafting of position papers or platforms, fund rallies or debates, or underwrite the development of a campaign advertisement. It simply benefits the recipient personally.[5] Even if it would be appropriate to accord presumptive legitimacy to an officeholder's provision of access to campaign supporters, it would not be appropriate in the context of personal gifts. It may be that campaign donors "support candidates who share their beliefs and interests and candidates who are elected can be expected to be responsive to their concerns," *McCutcheon*, 134 S. Ct. at 1441, but there is no analogous political alignment between officeholders and gift-givers.

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[5] By contrast, federal law strictly proscribes the "personal use" of campaign contributions by candidates. 52 U.S.C. § 30114(b)(1); 11 C.F.R. § 113.1(g).

Finally, this Court's First Amendment analysis of campaign finance laws is not applicable to a public corruption case because of the radically different structure and operation of the two bodies of law. Campaign finance laws are fundamentally prophylactic, and operate under the principle that "[t]he best means of prevention is to identify and remove the temptation" inherent in unchecked campaign contributions and expenditures. *McConnell*, 540 U.S. at 153. Even the base contribution limits "are a prophylactic measure" that apply regardless of a would-be donor's intent. *McCutcheon*, 134 S. Ct. at 1458. Conviction under federal bribery law, by contrast, requires proving that an officeholder knowingly entered into a corrupt agreement to accept something of value in exchange for performing or promising to perform "official acts." 18 U.S.C. § 201. Otherwise put, a contribution limit applies to all contributors *regardless* of whether a quid pro quo is shown as to each individual contributor; the bribery law applies *only* when a quid pro quo is found.

The debate in *Citizens United* and *McCutcheon* about scope of cognizable corruption was thus, at its base, an analysis of the extent to which an individual's First Amendment-related activities could be prospectively restricted where there is no evidence of that individual's corrupt intent. Bribery and other public corruption laws apply only after a specific corrupt exchange has been committed by an individual with the requisite intent. *See, e.g.*, *United States v. Rosen*, 716 F.3d 691, 700 (2d Cir. 2013) (noting that the need

to prove official's corrupt intent "eliminates the possibility that he will be prosecuted for bribery without fair notice"). Indeed, this Court has consistently recognized that the entire point of campaign finance laws is to reach beyond the prosecution of bribery and other public corruption crimes so that corruption can be prevented *before* it occurs. *Buckley*, 424 U.S. at 27-28 (noting that "laws making criminal the giving and taking of bribes deal with only the most blatant and specific attempts of those with money to influence governmental action" and "Congress was surely entitled to conclude that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions").

Accordingly, there is no merit to petitioner's contention that this Court's campaign finance decisions should inform its construction of the federal bribery statute and the Hobbs Act. That the *potential* for "ingratiation and access" was insufficient to sustain the tailoring of certain prophylactic campaign finance laws does not mean that an *actual* corrupt exchange of gifts and loans for acts characterized as "ingratiation and access" cannot support a bribery conviction.

III. Petitioner's Circumscribed View of the "Official Action" Necessary to Sustain his Conviction Has No Support in the Governing Statutes or Case Law.

In addition to petitioner's baseless argument that the First Amendment protects the "provision of access," he makes the related argument that the statutory text and related case law require a narrow construction of "official action" so that his actions are exempt from the scope of the public corruption laws. *See* Br. 43-50, 51-57

Petitioner's chief complaint is that "official acts" can only encompass actions that put "a thumb on the scales of any government decision," and his actions did not do so. Br. 1, 19. But this formulation of "official act" *was* reflected in the jury instructions, and there was ample evidence to support the jury's finding that he attempted to influence a governmental decision as described in those instructions. Likewise unavailing is petitioner's claim that steps taken in furtherance of "an eventual decision" cannot constitute official action, even if those steps are taken pursuant to a corrupt quid pro quo agreement. Governing case law clearly does not favor such an inflexible approach to the bribery laws, and adopting it here would "subvert the ends of justice." *United States v. Ganim*, 510 F.3d 134, 147 (2d Cir. 2007) (Sotomayor, J.).

Finally, in claiming that both the Constitution and principles of statutory interpretation demand a narrow construction of the laws under which he was convicted, petitioner ignores that these laws already contain a significant limiting requirement: proof of a corrupt quid pro quo. The district court's instructions repeatedly highlighted the need to find, beyond a reasonable doubt, a "corrupt exchange" or "quid pro quo," which obviates concerns about fair notice. *See* Pet.App.273a-274a.

A. Petitioner's Activities Constituted Official Actions and the Jury Instructions Correctly and Fairly Stated the Law.

In petitioner's estimation, the only legitimate target of congressional efforts to rein in public corruption is what he views as "core bribery," encompassing only "an official's agreement to corrupt the government's decisional process to achieve a specific governmental outcome." Br. 27 Petitioner consequently charges the lower court with "grievous error" (Br. 55), for declining to instruct jurors that: "The questions you must decide are both whether the charged conduct constitutes a 'settled practice' *and* whether that conduct was intended to or did in fact influence a specific official decision the government actually makes – such as awarding a contract, hiring a government employee, issuing a license, passing a law, or implementing a regulation." Pet.App.146a-147a (emphasis in original).

But the instructions the jury heard quoted the full statutory definition of "official act" to make clear that the term covers only a "decision or action on any question, matter, cause, suit, proceeding, or controversy" which may "be pending, or which may by law be brought before any public official." As the *Valdes* Court found, including the statutory definition in jury instructions ensures they are sufficiently clear. 475 F.3d at 1325. The instructions here also stated that official action can mean "one in a series of steps to *exercise influence or achieve an end*." Pet.App.275a (emphasis added). The jury instructions thus defined an "official act" in such a manner as to require the jury to find *more* than the "mere" provision of access, and the evidence fully supported such a finding.

It is beyond dispute that Williams' ultimate goals required the performance of "official acts," *see* Part I.A, *supra*; Williams wanted state universities to perform studies, for a state commission to provide funding, and for the state health plan to cover Anatabloc, Pet.App.69a-70a. And the government's evidence amply supported the jury's finding that petitioner did agree to influence these "actual" governmental decisions. He admitted as much in the district court: he conceded making "a vague promise to Williams to help Williams obtain studies for Star Scientific" in exchange for Willia[illegible]ifts and loans, but maintained that such conc[illegible] could not "establish federal corruption" as a matter of law. *United States v. McDonnell*, No. 3:14-CR-12, 2014 WL 6772486, at *3 (E.D. Va. Dec. 1, 2014) (denying motion for judgment

of acquittal). On multiple occasions, he took steps to advance Williams' goals for his Anatabloc product, and to that end, he directed subordinates and state officials over whom he held appointment power to meet with Williams and his company, and used state property in his attempts to convince researchers to study Anatabloc. *See* Pet.App.70a-77a. Williams also testified that he "was loaning [petitioner] money so that he would help our company," and that he expected petitioner "to help me move this product forward in Virginia" by "assisting with the universities, with the testing, or help with government employees, or publicly supporting the product." Pet.App.78a.

Petitioner also objects to the jury instructions because they defined "official act" to include steps "in furtherance of longer-term goals," which he dismisses as "absurd." Br. 54. He characterizes the actions he undertook to advance his benefactor's "longer-term goals" – such as promoting clinical research for Anatabloc with Virginia's Secretary of Health and Human Resources and urging the Virginia Secretary of Administration to meet with Williams' company – as merely "prefatory" and "information-gathering" in nature (Br. 16), and asserts that as a matter of law they could not constitute "official action" under the bribery laws (Br. 33).

As a preliminary matter, petitioner provides no definition of what constitutes a "prefatory" act, though it appears to parallel the equally ill-defined notion of "procedural access" that petitioner believes is protected by the First Amendment. *See* Part I.A,

supra. In any event, the record indicates that many of petitioner's activities far exceeded any conduct that would fit a reasonable description of those terms.

Nevertheless, petitioner's effort to draw a legal distinction between the ultimate official act sought by a bribe payor and the "prefatory" steps an official takes to reach this end is not supported by any judicial authority. It has been settled law since this Court's landmark decision in *Birdsall* that an official *does* take official action by, for example, seeking to influence the official action of other officials. 223 U.S. at 228-29. The federal bribery statute covers situations where an official "act[s] in his official capacity to influence" the disposition of a government matter by others, even if the official does not "have ultimate decisionmaking authority" himself. *Ring*, 706 F.3d at 470. The jury found that Williams had a reasonable belief in petitioner's ability to influence the official acts he sought and that petitioner did attempt to exert such influence – and indeed, that his status as "head of the Commonwealth's government" put him in "prime position" to do so. Pet.App.70a.[6]

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[6] As noted by the court of appeals, "[t]he Constitution of Virginia vests the Governor with '[t]he chief executive power of the Commonwealth.'" Petitioner thus had authority over "the policies of the executive branch," including "authority to approve" state health insurance plans, in addition to "myriad other powers," such as the power to appoint "12 of the 13 members of the State Council of Higher Education for Virginia; all members serving on the boards of visitors of [VCU] and [UVA]; and a majority of commissioners on the Tobacco Commission." Pet.App.70a

(Continued on following page)

The transactional relationship between petitioner and Williams continued to develop over time, but as the case law makes abundantly clear, a quid pro quo arrangement is no less corrupt if it is ongoing. "[A] reading of the statute that excluded such schemes would legalize some of the most pervasive and entrenched corruption, and cannot be what Congress intended." *Ganim*, 510 F.3d at 147. "[D]onors and recipients engaged in ongoing bribery schemes do not always spell out in advance the specific match between gift and act." *Id.* at 148. *See also, e.g.*, *United States v. Blagojevich*, 794 F.3d 729, 738 (7th Cir. 2015) ("Few politicians say, on or off the record, 'I will exchange official act X for payment Y.'"), *cert. denied*, No. 15-664, 2016 WL 1173129 (U.S. Mar. 28, 2016); *Jefferson*, 674 F.3d at 359 ("[B]ribery can be accomplished through an ongoing course of conduct.") (internal quotations omitted).

Finally, even if petitioner's steps towards achieving the official act were merely "prefatory," the case law indicates that it was not necessary for the Government to prove that petitioner took any actions at all. Honest services fraud and Hobbs Act extortion, like bribery, are "completed at the time when the public official receives a payment in return for his agreement to perform specific official acts; *fulfillment* of the quid pro quo is not an element of the offense."

(citations omitted). This is in contrast with the state legislator in *Urciuoli*, who had no authority over the mayors he contacted. *See* 513 F.3d at 295.

Evans v. United States, 504 U.S. 255, 268 (1992) (emphasis added). As the instructions made eminently clear, "[b]ribery means that a public official demanded, sought or received something of value *corruptly* in return for being *influenced* in the performance of any official act." Pet.App.273a (emphases added).

B. The Corrupt Intent Requirement Obviates Concerns About Fair Notice.

In arguing that this construction of "official act" will "criminalize" everyday politics and "routine courtesies" (Br. 25), petitioner ignores that the government must show corrupt intent to sustain any conviction under the honest services statute or the Hobbs Act.

To be convicted under the standard applied below, petitioner had to receive an "item of value corruptly in return for being influenced in the performance of any official act." Pet.App.273a. The court's instructions repeatedly highlighted the need to find, beyond a reasonable doubt, a "corrupt *exchange*" or "quid pro quo." *See* Pet.App.273a-274a ("Bribery involves the exchange of a thing or things of value for official action by a public official. In other words, a quid pro quo. You've heard that phrase, the Latin phrase, meaning 'this for that' or 'these for those.' ").

This Court has recognized that the corrupt intent element obviates concerns about fair notice, *Skilling*, 561 U.S. at 412-13, as have the courts of appeals. "[C]ritically," the need to prove petitioner's corrupt

intent "eliminates the possibility that he will be prosecuted for bribery without fair notice." *Rosen*, 716 F.3d at 700. Other courts of appeals have been satisfied that stressing the "critical *quid pro quo*" not only "correctly describe[s] the law of bribery," but also negates any concern that a defendant will be convicted on the basis of "innocuous" or "routine" activities. *See, e.g.*, *United States v. Kemp*, 500 F.3d 257, 281-82 (3d Cir. 2007); *see also id.* at 281 ("Read fairly, the instructions proffered by the District Court repeatedly emphasized the critical *quid pro quo*, and left no danger that the jury would convict upon merely a general attempt to curry favor or build goodwill."). This requirement ensures that the Fourth Circuit's construction of "official acts" will not encompass an officeholder's genuinely "innocuous" courtesies, information-gathering functions or ceremonial acts. For that reason, petitioner's overwrought allegations that the Fourth Circuit's decision will lead to "disastrous consequences" fall flat. Br. 40-43.

This case will not jeopardize any politician's ability to "[i]nvit[e] donors to the White House Christmas Party," "pose[] for photos," "answer[] a donor's call," send "party invitation[s]," "refer[] a donor to an aide," or "participate in a routine roundtable," for the same reasons it would not proscribe the hypotheticals described in *Sun-Diamond*. *See* Part I.B, *supra*. None of these activities, taken alone, implicates any "question, matter, cause, suit, proceeding or controversy" whose answer or disposition is determined by the

government – and none reflect the nature or extent of the actions petitioner took here.

The district court's reliance on corrupt intent to police the boundary between legal and illegal conduct is entirely consistent with the bribery laws as they have been interpreted by this Court and the courts of appeals for decades, and certainly poses no existential threat to our political system. "The distinction between legal lobbying and criminal conduct may be subtle, but, as this case demonstrates, it spells the difference between honest politics and criminal corruption." *Ring*, 706 F.3d at 464. "[T]he trier of fact is quite capable of deciding the intent with which words were spoken or actions taken as well as the reasonable construction given to them by the official and the payor." *Evans*, 504 U.S. at 275 (Kennedy, J., concurring).

Ultimately, McDonnell was not convicted for giving Williams "access" to his own time; he was convicted for agreeing to use the authority of his office to influence the disposition of government matters, either by himself or by others over whom he possessed formal authority. To convict, the jury was required to find that he knowingly accepted things of value *in exchange for* "being influenced in the performance of an official act." Federal prosecutors will not assume "extraordinary supervisory authority over our democracy" (Br. 19) if such conduct is penalized under the bribery laws, nor will upholding petitioner's conviction risk "shattering families, destroying careers, and altering elections." Br. 43. But if the activities at the

heart of this case are indeed "ubiquitous" (Br. 11), and "happen[ ] literally every day" (Br. 40), as petitioner claims, the Court ought to be troubled about what that portends for American democracy.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

J. GERALD HEBERT
Counsel of Record
TARA MALLOY
PAUL S. RYAN
MEGAN P. MCALLEN
BRENDAN M. FISCHER
THE CAMPAIGN LEGAL CENTER
1411 K Street, Suite 1400, NW
Washington, DC 20005
(202) 736-2200
ghebert@campaignlegalcenter.org
Counsel for Amicus Curiae

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